How to turn Article 2 TEU into a down-to-Earth provision?

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The ‘values on which the Union is built’, the famed article 2 TEU, has arguably never been intended to leave the world of high ideas to land on a *prettore*’s desk. Law and non-law at the same time, it is a beautiful declaration as righteous and self-congratulatory – indeed, these are the values of our Union! – as destined for foreign consumption: look at our values! With several Member States presumably failing all points in one direction: Sir Isaiah Berlin and numerous other thinkers doubting the inherent kindness and reason of mankind were probably right: the human nature might be better described in the *Lord of the Flies* than in a dream of Communism inevitable. Most importantly, unlike many wished to believe, being part of the EU does not make a state immune from the potential problems all states face.

Since ‘people are not angels’ they create institutions to be protected from themselves: from extreme passions, from extreme violence, from extreme ‘democracy’. Indeed, the EU has been traditionally viewed as one of the most effective among such protections – a radical elitist project *par excellence*. The Union created a broad and appealing programme of supranational restraint of the States in relation to each-other, also showing to the world that a different way of sharing a small continent is possible (eg de Búrca 2013).

Based on a free choice of the participating states (certainly not the peoples, especially initially) the Union has recently proclaimed all the things nice in Article 2 with no legal enforcement mechanism *sensu stricto*. Now we see that this is probably not enough, whence an emerging line of thinking about turning Article 2 TEU – a bunch of solemn proclamations – into something more akin to black-letter law. Prominent contemporary legal scholars work on this puzzle, to which fact the exchanges building on von Bogdandy’s ‘Reverse *Solange*’ and Jan-Werner Müller’s ‘Copenhagen Commission’ proposals in this blog testify. There are many more ideas floating around. Vice-President Reding suggests granting the EU general human rights jurisdiction (Bruges speech, Sept. 4, 2013), Venice Commission President Gianni Buquicchio advocates entrusting the Venice Commission with the role of the guardian of Article 2 TEU – many others can be named.

In this context Kim Scheppele’s proposal is a welcome addition. First of all, it seems to be workable – especially if we make the trick (suggested in the proposal itself) of substituting Article 2 with Article 4, which establishes the Duty of Loyalty – a clearly justiciable and much used principle of EU law. Secondly, it is much less revolutionary than it might seem, which is also a positive feature with an eye on possible implementation. Unlike Vice-President Reding’s suggestion the proposal does not require a Treaty change and could be deployed swiftly. Lastly, and very importantly, it neither requires a creation of a new body at EU level nor is directly dependent on the national judiciaries in the troubled Member States, which distinguishes it positively from what J.-W. Müller and A. von Bogdandy, respectively, have suggested.

Coming from such an established voice advocating the protection of rule of law at the national level, Kim Scheppele’s proposal definitely enjoys sufficient legitimacy to be taken very seriously. In what follows, I look at the “problem” of democracy (1.), the “problem” with bundling infringements (2.), the problem of determining the meaning of “values” (3.), and the problem with penalties (4.). I conclude that two problems are fictitious but two others are real.

The “problem” with democracy

It is worth starting with an aside. It is unquestionable that the proposal, should it start working will ‘invite ever more adventurous challenges to different national rules’, to agree with what Jan Komárek wrote in his reaction. In fact, it would amount to prohibiting a wide range of democratically viable choices at the national level, effectively barring nations from making serious (even fatal) mistakes – or at least from moving in the direction, which would be characterized as mistaken in the light of the prevalent understandings in the EU today. While this ‘attack on democracy’ as such can be legitimately criticized – as has been done, for instance, by Floris de Witte

in this blog – the ethical starting point for any such criticism (which is as such tactically very sound) could be regarded as problematic: the glorification of democracy should not lead to suffering, quite on the contrary. Following J.H.H. Weiler, P. Van Parijs, and numerous others, glorifying democracy beyond its purely instrumental function in building what we would consider a good society is probably not a valid starting point – especially in the context of the EU (cf Neyer OUP 2012). Also historically it does not fly: the EU's origins and goals are clearly anti-Statist to a great degree and to pretend that the discovery that this is the case should cause surprise would be unsound in the light of the whole history of the European project's development. Supranationalism is about taming the beast of nationalism – and the story of the creation and enforcement of supranational law is of crucial importance here. Indeed, to quote Judge Lenaerts, 'the infringement procedure is a distinctive mark of [EU] law, which makes it different from international law' (44 CMLRev 2007, 1639).

Viewed in this light the idea behind making Article 2 TEU enforceable law could be regarded as a legitimate – if not predestined – next step in the evolution of the European project. That thinking in this direction is nothing new is confirmed by the very texts of the Treaties – besides the function of Article 7 TEU (to leave aside its procedure for a minute) the very story of the Member States' courts bullying the ECJ to ensure that the EU move into human rights protection, the rule of law etc. on which the very notion of direct effect and supremacy of EU law was clearly made dependent is a clear reminder of what is new and what is not. In the light of all this although we know that Article 2 TEU, when applied as black-letter law will diminish national democratic space it is a good thing rather than a bad thing, which flows naturally from all the history and the very purpose of EU integration.

The "problem" with bundling

Time to turn to the proposal as such. It is two proposals really. The first one is about bundling infringements of different provisions to allow the Commission and the Court to see the bigger picture of a systemic infringement. The second one is about how you collect the fines from the Member States found to be in breach. Fining is one thing – and is also a separate procedure and a provision in the Treaty – stating the breach is another. I start with bundling practices in order to determine if there is a systemic breach.

How innovative will the bundling of infringements be *per se*? The practice is known to the Court and although the Treaties do not contain any references to bundling directly, there seem to be no reasons why we should not be convinced by the reasoning of the ECJ in *Irish Waste* (Case C-494/01 *Commission v Ireland* [2005]): 'the fact that the deficiencies pointed out in one or other case have been remedied does not necessarily mean that the general and continuous approach of those authorities, to which such specific deficiencies would testify where appropriate, has come to an end' (para. 32). Indeed, the whole story of the Commission's guarding the Treaties through bringing non-compliant Member States to Court is a story of seeing the patterns in numerous infringements and, eventually, bundling them together, as brilliantly analyzed by Pål Wennerås (43 CMLRev 2006, 31). Either you monitor what the Irish do with their waste for 24 years, breaking the law everywhere all over the country – or observe for 10 years how French farmers attack and harass strawberry-bearing Spaniards in full sight and at full complacency of the French state, what we are dealing with is bundling of numerous tiny infringements, which allows seeing the bigger picture. The latter then constitutes the real infringement of the law. Indeed AG Geelhoed in *Irish Waste* added an interesting aspect to the infringement story, which was picked up by the Court stating that the cumulation as such can result in a finding of a *different* infringement (para. 19). This does not go as far as stating that cumulation of seemingly innocent practices could produce illegal results, but the 'cumulation trend' is clear.

Wennerås, one of the leading minds this field suggests also bundling and finding infringements based on the numerous violations of *different* instruments in one sector of the *acquis* (43 CMLRev 2006, 49), which would make all the sense in the world, since, understood systemically, the infringement procedures in the Treaties have only one objective: to ensure that the Member States comply with the letter and, crucially, *the spirit* of the law, the latter uniquely coming to sight when a number of concrete practices is analyzed. The innovative nature of Scheppele's proposal is thus not in bundling as such, but in the audacity with which it ventures into the murky waters where law and policy meet and nothing is as clear as in the context of the straight-forward internal market *acquis*: the proposal suggests an important move far superseding the current practice.

The problem with determining the exact meaning of “values”

This reveals an acute problem, which is profoundly ideological: who is to decide what is democracy, the rule of law etc. etc. etc.? Should an infringement of Article 2 TEU be found directly, as Jan Komárek also suggested, it will be necessary to create an *acquis* on values, which does not exist. While the Copenhagen criteria and their progeny provided an attempt to mold such *acquis* in the context of pre-accession assessment of the candidate countries, the practice leaved too much to be desired – the Commission has clearly demonstrated that at times it had no clue of what it was actually doing – especially in the medium to long-term perspective – which essentially landed us all the problems we are facing today. Having written a book (Kluwer 2008) and numerous articles on the failure of the Commission’s deployment of the Copenhagen criteria in order to promote democracy and the rule of law, I regard the myth of this exercise’s success as very puzzling: it has clearly been a failure, which brought Hungary and other countries highly problematic from the point of view of values into the Union only pretending to solve outstanding problems, thus preferring Potemkin villages to solid solutions. While there is no *acquis* on values, the Commission failed to shape substance behind Article 2 TEU. This provides a viable source of skepticism in thinking about Jan-Werner Müller’s proposal: can the Commission (or a Copenhagen Commission) do better this time? – we have no guarantee.

Allowing the Court to shape the essence of values as expressed in Article 2 TEU turning them into law (what Kim Scheppele’s proposal comes down to in practice) could be a viable strategy. Indeed, this is exactly what happened with one important value already – namely, the protection of human rights mentioned above. Uniquely ECJ-made – with a recourse to a number of inventive and ultimately convincing tools, it is now codified in a largely unworkable Charter of the Member States’ making, which even the Vice-President of the Commission seems to regard as an obstacle on the way of treating Article 2 seriously (I refer to Commissioner Reding’s proposal to repeal Art. 51 of the Charter). In the context of the Member States’ and the Commission’s performance in this area (both of which are clearly poor), the Court is probably the most reliable actor to entrust the law of values to (and the Commission will play its part).

While this might be desirable, some clearer connections with EU law (read the EU’s *acquis* as now understood) are seemingly required, besides our desire to impose militant democracy on all the Member States of the Union. One of such factors could be an ability to demonstrate that the changes in the institutional structures and administrative and legal practices of a particular country have a strong potential to hinder the development of EU law, thereby activating the duty of loyalty which can now be used as a self-standing instrument. A reference to the values could be added, too. It is necessary to be acutely aware of the fact that making values a self-standing tool in the hands of the Commission and the Court could threaten the vital balance of powers in the context of European federalism.

Numerous different ways of approaching loyalty could be outlined – from outlining the doubts related to the functionality of the judiciary of the Member State in question in the context of EU law to pointing to overtly hostile acts *vis-à-vis* the neighbours by harming your own citizens (which is the case with Slovakia today, for instance). Creating a catalogue of the possible causes of action which would be firmly in the realm of EU law to connect to Article 2 and which would be capable of supplying indicators of a Member State’s failure to comply based on an array of signs would be a most useful enterprise – akin to the one in which the Dutch section of FIDE engaged in search for direct effect before *meester* Stibbe came up with *Van Gend en Loos* and then *Da Costa* (as reported by Vauchez, 16 ELJ 2010, 1).

The problem with penalties

The second part of the proposal – the one dealing with fines and lump-sums and their collection – arouses much more skepticism than the first one, which is roughly rooted in current practice and boasts a clear potential.

This skepticism is chiefly connected to the main assumption that is entertained in the proposal, namely that fining Member States and making them pay works, improving compliance. Much of the existing literature seems to be pointing to the contrary. So while ‘how to collect the money?’ is definitely a legitimate question, it seems to have very little to do with the enforcement of EU values (or, indeed, EU law) in the Member States. Looking at the numbers of fines claimed and the results this brought in terms of correcting Member State behavior during the 20

years of operation of the relevant Treaty provision, it is impossible but to agree with a recent study by Brian Jack: '[the story] clearly suggests that [ECJ's] lump sum penalties have not had dissuasive effects' (19 ELJ 2013, 420). Moreover, the number of times when the provisions has been used so far (14(!)) clearly points to its profound deficiency not only in design, but also in application (especially knowing the level of some Member States' compliance). Indeed, Jack looks in the direction of Article 7 for possible help in this context, while all the proposals related to Rule of Law enforcement in the Member States made to date take as a starting point the dysfunctional nature of that provision: the reason why Kim Scheppele looks at fines in the first place it seems. The fact of the matter is that *both* Article 7 and fines are problematic.

Most importantly, given that the fines are never high enough to crush the Member State financially (for a very good reason), they will most likely not result in compliance in the countries where this issue is politically sensitive. Article 2 issues are *the most sensitive imaginable*. Fining a country having problems with democracy and the rule of law – where the bridge between voters' preference and the people in power is either seriously threatened or lost (why would you find a breach of Article 2 otherwise?) produces quite a different picture. When the cost of compliance *de facto* is nothing short of a regime change, no fine will work: the country will be paying ever increasing amounts. In this context it matters little whether the money is actually recovered or not into the budget of the Union it seems to me: the whole point of financial penalties is to bring about compliance, not to initiate an internal reallocation of funds within the EU. To quote Brian Jack again, '[t]he Court's financial penalty clearly has not had the intended coercive effect' (discussing numerous *Commission v. Greece* cases: 19 ELJ 2013, 413). The fact that fines do not actually help compliance is great news though, since it means that the problem with passing secondary legislation in order to recover the fines into the EU budged does not even arise, making the proposal (its first part at least) virtually immediately deployable.

To conclude

This is a valuable proposal which is less revolutionary than it might first seem. Given that bundling is already practiced by the Commission (albeit in quite a different way), transposing the practice to include key principles and values underlying EU law seems doable, depending on political will, rather than anything else. At the same time, an eternal problem whether we want to give *carte blanche* to the Court becomes particularly acute. While my analogy with the story of making human rights protection part of the *acquis* will convince some, I can imagine the choice for the Court – this choice is necessarily implied in the proposal in question as I read it – to be one of the most difficult elements to sell. Clearly, we are not speaking about EU *acquis* here: what we are speaking about is allowing the ECJ to redesign national democracies of the Member States. In an atmosphere where there is no underlying ideal of Justice in sight (eg de Búrca et al (ed) EUI 2013) and the *Ethos* of the whole enterprise is befogged beyond being decipherable at times (eg Williams CUP 2009), critics will jump on this aspect of the proposal, no doubt.

Sober analysis of the alternatives demonstrates, however, that the Member States (via Article 7) or the Commission (via the Copenhagen criteria and their progeny) are likely to deliver much worse results. Lastly, the part of the proposal related to the recovery of fines and lump sums fails to demonstrate a clear and direct connection between financial penalties and the defence of values. Indeed, the whole history of EU external relations seems to show quite well that sanctions (and in the proposal in question we are speaking about penalties of an infinitely smaller, negligible state) do not work.

The bundling of findings across the board to monitor the Member States' behaviour at a meta-level, however, could proved a true vision of the compliance assessment in the future: very effective and vitally important.

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